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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 534

ANTHONY PROVENZANO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AS AMICUS CURIAE AND BRIEF AMICUS CURIAE.

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The American Civil Liberties Union of New Jersey, hereinafter called the "Union", respectfully moves for leave to file a brief amicus curiae in this case. The attorneys for petitioner have consented to the filing; as of this writing no response has been made by the attorneys for the respondent. The consent has been filed with the Clerk of the Court.

The Union is a state subdivision of the American Civil Liberties Union, a national non-political organization devoted solely to defending the civil liberties guaranteed by federal and state constitutions. The New Jersey chapter is organized for the same purpose with special emphasis on problems arising in New Jersey.

The Union is interested in the instant case, because it believes that the prosecution in this case did not constitute a fair trial of the petitioner in that petitioner may have been prejudiced by adverse publicity via various media of communication as a result of an incident which occurred on the morning of the second day of trial. The increasing impact of the influence of publicity on the capacity of a Court to conduct a fair trial is a matter which concerns the Union deeply, and whose legal implications should be determined by this Court.

The Union is not unaware of the fact that this Court does not favor amicus curiae briefs in support of certiorari petitions. However, unless the petition for certiorari is granted there will be no opportunity to submit on the merits its views with respect to the major issue herein involved, to wit: Should not petitioner have been granted the right to question the jury as to whether any of its members had been influenced by the events of the morning of trial, and the communication of these events to such juror by the method in which the communication had been received?

Statement of the Case.

Anthony Provenzano was an officer of Local 560, International Brotherhood of Teamsters and as such was charged with extortion in violation of 18 U. S. C. Sec. 1951 (The Hobbs Act). The trial commenced on Thursday, May 23, 1963. The day was taken up with various motions and resumed on Friday, May 24, 1963. At 6 o'clock that morning (139a) one Walter Glockner, a shop steward of the company against whom the extortion was alleged to have been practiced, was shot to death. At 2 o'clock, when the trial resumed, the matter was formally brought to the attention of the trial court. The government attorney stated to the Court

> "Now, we have been besieged by the press with respect to Mr. Glockner's participation, if any, in this trial, and what his relationship is to the case. We have declined to give any comment at all. The only statement I gave at 9:00 o'clock this morning was that—this was in connection with this case—it is a fact that Mr. Glockner was to be interviewed by our office today and as a potential witness. I say potential."

It is undisputed that thereafter motions were properly addressed to the trial court to poll the jury as to whether any of them had become aware of the episode prior to coming to Court that morning or at any time thereafter. The motion was denied. The jury was sequestered but permitted to have access to television and newspapers which the trial court stated had been censored (135a):

"The Court: I have decided with respect to the jury to relax some of the restrictions heretofore imposed, because I have reached a conclusion that all of them are not necessary. To a limited extent and under censorship the jurors will be permitted to see some television programs and to see some newspapers. The television programs will be monitored. The newspapers will be screened so that in connection with television programs or newspapers nothing will come to the jury which could possibly create any impression from an outside source with respect to the issues here, the testimony or any other developments. I want to bring that to the attention of counsel."

Reasons for Granting the Writ.

This Court has over the years delineated the essentials of a fair trial. Citation is obviously not necessary to remind this Court that it has admonished the states as to the right of counsel in both capital and non-capital criminal cases, as to the freedom from unreasonable search and seizure, the prohibition against cruel and unusual punishment, as to the improper use of confession and as to the impropriety of commenting on the defendants failure to testify in his own behalf. Certainly the elements of a "fair trial" include the right to an unprejudiced jury, if trial by jury is to be really had.

In this case, the impact of a barrage of mass communication media on a trial actually in progress must be appraised. While it is clear that the record does not too clearly describe the exact content of the radio, television and newspaper broadsides, the trial court's attention was

directed to the fact that the murder of Glockner was described as having been carried out by persons interested in petitioner's cause (137a):

> "* * * I'm certain the Court has read, seen and heard, since Friday morning concerning this unfortunate incident and the alleged arrest of somebody whom they said was Mr. Provenzano's brother-in-law, and that was a straight out-and-out distortion of fact—as a so-called material witness, and all of that is entirely—and some statements made by the Prosecutor's Office in Hudson County, alleged reports of F.B.I. agents, and the entry of the F.B.I. agents and the Attorney General into this matter * * *"

Under these circumstances, while it is entirely possible that all of the jurors somehow miraculously escaped receipt of the communication via radio, television and the newspapers prior to their sequestration, the statistical improbability is so manifestly great that the defendant should have been permitted to make due inquiry as to the possibility of such influence.

The habit of persons in the United States today to read morning newspapers with their breakfast, or to be listening to radio broadcasts both at home and in their cars is so universal and general, that a high degree of probability exists that one or more of the jurors were in receipt of this communication; that the use of television in the morning is less general may be conceded, but that it exists in some measure can not be denied. In any event more than ample justification existed for the defendant's motion to make inquiry of the jury as to whether any of the jurors had in fact received this communication and the impact

thereof. The importance of a full examination of jurors as to whether prejudice has been caused by newspapers or other publicity has been fully recognized. *Marson* vs. *United States*, 203 F. 2d 904 (1953); *Blumenfeld* vs. *United States*, 284 F. 2d 46, 8 Cir. (1960), cert. den. 365 U. S. 812.

In *United States* vs. *Dioguardi*, 20 F. R. D. 33 S. D. N. Y. (1956), Judge Edelstein, in considering a motion to dismiss an indictment because of prejudicial publicity, after condemning the publicity which had ensued; nevertheless, pointed out that the proper way to handle the effect of the publicity would be to determine on the voir dire what the effect on prospective jurors had been and whether irreparable damage had been caused.

Of course in the instant case trial had commenced and a separate examination should have been permitted to consider the impact on the jurors then sitting.

It would seem the government is here caught in a peculiar dilemma. While of course the process of preparing a trial is costly and time consuming, and cases should be heard when they reach the proper place on the calendar, one of two things must emerge. If the inquiry revealed that prejudice had been caused the defendant by virtue of the murder and its communication, then of course the petitioner was entitled to a mistrial and a postponement; if the inquiry demonstrated that there had been no prejudice the case could have gone on. The basic issue then, is whether a defendant in a criminal case does not have the right to examine the effects of adverse publicity on a jury, when that publicity occurs during the progress of a trial; and the only way in which it can be determined whether the jury has been influenced is by an examination of the jury itself.

An important consideration in this case, too, is the fact that the trial court undertook to censor the television programs and the newspapers which the jury was permitted to see and read. This was done by instruction to the marshall (135a). Whatever instructions were so given to the marshall were not revealed to counsel for the defendant and the court refused to acquaint counsel with those instructions (137a).

The situation here is not greatly different from the problem raised in *Gideon* vs. *Wainwright*, 372 U. S. 335 (1963). In that case counsel for the State of Florida argued that it was not essential for a fair trial in a criminal case that a defendant be represented by counsel, if the trial judge takes pains to help him. See *The Making of Justice*, by James E. Clayton (1964), page 136 et seq. The argument of course was rejected. It may well be that the trial court in its instructions to the marshall gave exemplary instructions, but no one will ever know, certainly not petitioner. Obviously all elements that are materially involved in the administration of the trial should be communicated to the person whose liberty is to be effected by the results of the trial. Whether the instructions given by way of monitoring television programs could and did prevent news bulletins which are suddenly flashed from coming to the attention of the jury, or whether newspapers with obvious deletions did in fact prevent the jury from learning about the case from sources outside competent evidence can not be ascertained. In short there is no way that the defendant in this case can determine whether the jury was influenced by testimony or evidence de hors the courtroom. For the events occurring on the morning of the second day of the

trial not to have influenced the jury, one must rely on a great statistical improbability; and for the events which occurred thereafter and during the progress of the trial one must rely on the infallibility of a trial judge without any possibility of scrutinizing his actions. As Mr. Justice Stewart succinctly commented in answering a contention made during the oral argument in *Gideon, supra,* that a trial judge would see that a defendant without counsel would get a fair trial "I assume all that you are saying is true, but the judge's job is to be a judge, not a defense counsel." *Clayton, supra,* p. 137. In either case the Union does not believe the requirements of a fair trial were met.

Conclusion.

By reason of the foregoing the petition for a writ of certiorari should be granted.

Respectfully submitted,

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